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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1541

ARAM AJAMIAN,

Petitioner,

v.

THE TOWNSHIP OF NORTH BERGEN, and MILTON J. MUSS,

Respondents.

PETITIONER'S REPLY BRIEF AND ADDITION OF CASE TO PETITION FOR WRIT OF CERTIORARI RENDERED BY THIS COURT AFTER THE PETITION

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249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

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Reply to Respondents' Objection to Jurisdiction of the Petition

The respondents state at page 2:

> "The trial court's opinion, Appendix A, and in particular pages 55 et seq., indicates that Petitioner, over a period from July 8, 1966 to November 8, 1966, received repeated notices from sundry Township officials and that his so-called 'forcible closing of an apartment building by a 24 hour notice without a hearing or opportunity for a hearing, which is referred to throughout the Petition, as the prime basis for his alleged constitutional question is based, not on fact, but fiction.' "

The petitioner's Brief page 14 reputes this anticipated statement of the respondent as stated on page 14:

The Court after stating (298a-24):

> "naked notice not enough constitutionally necessarily implies an opportunity to be heard before his property is taken without due process of law."

And at pages 5, 6 and 7 of the petition appears:

But, this was not the issue the Court was to pass upon. The Court was to pass upon and decide if the proceeding of the Building Inspector should be set aside to close the building, because he had not complied with the requirements of the New Building Code in regards to notice and opportunity to be heard, depriving plaintiff of due process of law, by his summary action on November 9, 1966 of closing the building by 24 hour notice given to this plaintiff and each of the tenants of the apartment house building, and a request that the proceeding of the Building Inspector be set aside closing the building, and that the plaintiff be allowed to open up the closed building, and thereafter, the Building Inspector, if he still wanted to proceed against the petitioner to give the petitioner the notice and hearing before the Commissioners as the code required him to do. After the determination by the Commissioners, if it should be against the plaintiff, he would be given 30 days opportunity to comply. The plaintiff thereafter has several choices one of which is to do nothing and allow the Township to demolish the building and sue the Township for damages to be assessed by a jury, which right the Court, by its decision, took away from this plaintiff. *Hutton* v. *Camden,* 39 N.J.L. 122, 23 AM, Rep. 203 (1876).

The Trial Court's opinion (41a) states: "to account for the same" and "to show that the alleged nuisance was not one in fact" neither of which was necessary to

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be shown by the "in lieu of prorogative writ" as stated in *Coast* v. *Borough of Spring Lake,* 56 N.J.E. 615, 623, 624, 36 A 21 affirmed, 58 N.J.E. 586, 47 AT 1131, E & A 1897 "and it is not a fact that otherwise any public officer by pretense of summary abatement, throw person into "in lieu of prorogative writ", forcing the person to be deprived of guaranteed right of jury trial. "If the Court's decision were to remain, this plaintiff would be deprived of jury trial." Everything was taken care of except the electrical work (411a to 15) which could not possibly be done except by the complete destruction of the apartment house.

In any event the building inspector could not summarily abate a nuisance when the Township had given such power only to the Board of Health, Court's opinion (49a).

The Court having decided that the building inspector had not complied with the building code (35a) in not giving notice and hearing to plaintiff, said fact being admitted by the defendant, should have set aside the building inspector's proceeding in closing up the building summarily for the purpose of abating a nuisance.

The Court having decided that the National Building Code which embraced the Electrical Code, adopted by North Bergen in 1966, did not apply to this plaintiff's building because the code specifically stated it was to be applied only to buildings after the adoption of the code, and the Court having decided said building was built long prior to said code, nevertheless found the cables in the walls (102a-23; 103a-1 to 13; 104a, 16-17; 107a-14; 253a) not complying with the National Building Code (185a, 13-1; 186a-24) nevertheless should be made to comply with said code by tearing the building apart as above stated.

and at page 28 appears:

Hill Military Academy v. *City of Portland,* 53 P. (2) 55, 152 or 272 (1936). The facts in the *Hill* v. *Portland*

case is nearly exactly the same as this plaintiff's at page 58: "2, 3). "It is plain that the council proceeded first to condemn the building as unsafe and a nuisance, and then changed and declared it a fire hazard."

"That said Hill Military Academy, a corporation has failed to remove said fire hazard and failed to make the necessary repairs to said building requisite for safe occupancy for school purposes. The Council, therefore, directs that the further use or occupancy of the building known as No. 2468 N. W. Northrup Street, situate on the real property hereinabove described, shall cease, and the bureau of Fire is hereby directed, to abate the further use and occupancy of said building and the Commissioner in charge of said bureau is hereby granted authority to close said building and to prevent its further use and occupancy, until such time as the Hill Military Academy, a corporation shall repair and put in a safe condition in accordance with the Building Code, said building. While we do not deem it absolutely necessary, we will refer to the condition of the building, as it may have a bearing on the case. The following cases are instructive upon the questions involved:"

Grossman v. *City of Oakland,* 30 Or. 478, 41 P. 5, 36 L.R.A. 593, 60 Am. St. Rep. 832; *Ex parte Wygant,* 39 Or. 429, 64 P. 867, 54 L.R.A. 636, 87 Am. St. Rep. 673; *Daniels* v. *City of Portland,* 124 Or. 677, 684, 265 p. 790, 59 A.L.R. 512; *Why* v. *City of Marshfield,* 138 Or. 167, 5 P. (2d). For the reasons stated herein, the decree of the circuit court is affirmed."

At pages 25 and 26 of the petition appears:

N.J.S.A. 40:48-1 in Court's opinion on page 9, outlines the procedure. *Vanderhohen* v. *Rahway,* 120 N.J.L. 610, 1AT (2nd) 303 (1938).

> Notice must be given whether or not required by statute.

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The Appellate Court states:

> "There can be no question of the right of the State, or of its right to delegate the power to a municipality, to exercise its police power to take or destroy private property in a summary manner when necessary for the safety of the public. But the necessity for such action must be caused by an emergency which requires prompt action for public protection. For example, the immediate need for taking and destroying unfit food being offered for sale to the public or the immediate need for the destruction of buildings for the purpose of stopping or controlling a conflagration.
>
> In the instant case, however, there existed no emergency nor need for prompt action. In fact, nearly seven months elapsed from the time the building inspector reported that the buildings were in such dilapidated condition that they should be demolished and any action whatever being taken by the Common Council."

The original request in this plaintiff's action was also months ago not by the building inspector but the Board of Health (Exhibit 5) only to whom summary action was given. The building inspector was not given the police power of summary action, but had to follow the procedure of this building code as above.

POINT I

The following is a reply to Point I of the respondents' brief.

O'Neill v. *State Highway Department*, 40 N. J. 326 (S. C. 1963) 191 A (2) 48, the plaintiff had a choice between prerogative writ of mandamus and an action for damages with a jury trial, whereas this petitioner had no choice, but was compelled into a prerogative writ of cer-

tiorari, where there was no jury trial by rule 4:88-2. The petitioner did not ask for a jury trial because rule 4:88-2 stated there was no jury trial. The petitioner's prerogative writ of Certiorari did not ask a review of the facts as above stated but just that whether notice was given and whether petitioner had an opportunity to be heard, as required by the United States Constitution, the New Jersey Constitution, and the North Bergen Building Code.

O'Neill v. *State Highway,* the New Jersey Supreme Court which adopted the dissenting opinion of the Appellate Division 191 A (2) 48, states at page 133 of the Atlantic Report:

> "The court could not proceed to a final determination on the merits, against the objection of a party who might choose to relitigate the factual issues before a jury."

Ex Parte Wall, 107 U. S. 265 at page 289 quoted by respondent saying the court concludes with the observation but fails to state the addition following the above conclusion which is as follows on page 289.

> "Perhaps no definition, says Judge Cooley, is more often quoted than that given by Mr. Webster in the Dartmouth College case: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns'."

and on page 290 appears:

> "We have seen that, in the present case, due notice was given to the petitioner, and a trial, and a hearing was had."

In the above case quoted by respondent there was due notice and a hearing. In this petitioner's case there was no notice or hearing.

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As stated heretofore by the cases of *Hutton* v. *Camden*, 39 N.J.L. 122, 23 A. M. Rep. 203 (1876), *Coast* v. *Borough of Spring Lake*, 56 N.J.E. 615, 623, 624, 36 A 21, affirmed 58 N.J.E. 586, 47A-1131 E & A 1897, wherein both highest Courts of New Jersey state that unless the preceding of the building inspector is vacated than as stated by the Courts "and is it not a fact that otherwise any public officer by pretense of summary abatement, throw person "in lieu of prerogative writ" forcing the person to be deprived of guaranteed right of jury trial."

POINT II

The following is a reply to Point II of the respondents' brief.

Replying to Point II (a) respondent states "the petitioner was given ample opportunity over a period of four months" referring to notices given by the inspectors to do various work. Petitioner's brief at page 14 states in regard to these notices:

The Court, after stating (298a-24):

> "naked notice not enough constitutionally necessarily implies an opportunity to be heard before his property is taken without due process of law"

should not the Court have refused to set aside the proceedings of the building inspector to close the building.

Petitioner's brief at pages 25 and 26 states as heretofore above stated.

Replying to Point II (b) of respondent's brief:

Utley v. *City of St. Petersburg*, 292 U. S. 06, the Petition was given notice and an opportunity to appear at the hearing but did not appear.

The Court: at page 109 states:

> "It is enough that a hearing is permitted before the imposition of the assessment as a charge upon the land (Chicago, M. St. P. & P. Ry. Co. v. Risty, 276 U. S. 567; Londoner v. Denver, 210 U. S. 373, 378; Goodrich v. Detroit, 184 U. S. 432, 437), or in proceedings for collection afterwards. Hagar v. Reclamation District No. 108, 111 U. S. 701; Winona & St. Peter Land Co. v. Minnesota, 159 U. S. 526, 537; Wells, Fargo & Co. v. Nevada, 248 U. S. 165."

and at page 111:

> "Finally, the appellants are barred, or so the Supreme Court of Florida has held, by laches and estoppel. They stood by without opposition while the property was improved. They refrained from making use of remedies, both administrative and judicial, that were ready to their call. For nearly five years they held aloof without word or act of protest, and then invoked the aid of equity. Following Abell v. Boynton, 95 Fla. 984; 117 So. 507, and other state decisions, the Supreme Court of Florida withheld an equitable remedy from suitors who had slept upon their rights."

Ewing v. *Mytinger and Casselberry,* 339 U. S. 594, in no way relates to that of this petitioner's case involving misbranding of food articles—vitamins. The following quotations show how unrelated that case is to that of this petitioner's case.

The Court states at page 600:

> "For all we know, the most damage may come from misleading or fraudulent labels. That is a decision for Congress, not for us. The decision of Congress was that the administrative determination to make multiple seizures should be made without a hearing."

And at pages 601 and 602 appears:

"The purpose of the multiple seizure provision is plain. It is to arrest the distribution of an article that is dangerous, or whose labeling is fraudulent or misleading, pending a determination of the issue of adulteration or misbranding."

"Congress weighed the potential injury to the public from misbranded articles against the injury to the purveyor of the article from a temporary interference with its distribution and decided in favor of the speedy, preventive device of multiple seizures. We would impair or destroy the effectiveness of that device if we sanctioned the interference which a grant of jurisdiction to the District Court would entail. Multiple seizures are the means of protection afforded the public. Consolidation of all the libel suits so that one trial may be had is the relief afforded the distributors of the Articles."

The respondent cites as its strongest case *North American Storage Co.* v. *Chicago*, 211 U. S. 306. This case involves the destruction of food poultry unfit for human consumption as the court states at page 320:

"We think when the question is one regarding the destruction of food which is not fit for human use the emergency must be one which would fairly appeal to the reasonable discretion of the Legislature as to the necessity for a reasonable discretion of the legislature as to be necessity for a prior hearing, and in that case its decision would not be subject for review by the courts. As the owner of the food or its custodian is amply protected against the party seizing the food, who must in a subsequent action against him show as a fact that it was within the statute, we think that due process of law is not denied the owner or custodian by the destruction of the food alleged to be unwhole-

some and unfit for human food without a preliminary hearing."

And at page 316, the court states that this petitioner is entitled to a jury trial, which this petitioner was denied and further quotes the often cited case of *Lawton* v. *Steel*, 152 U. S. 133 at pages 316 and 317:

"In such cases burden would be upon the defendant to prove a justification under the statute. As was said by the Supreme Court of New Jersey, in a similar case (Am. Print Works v. Lawrence, 21 N. J. Law, 248, 259): 'The party is not, in point of fact, deprived of a trial by jury'."

This petitioner was deprived of a jury trial.

POINT III

Delay of justice is denial of justice.

State of Florida v. *Robert Dean Dickey*, the decision of which does not as yet appear in the last report of May 18, 1970 states as appears in the Daily News of May 26, 1970 on page 8:

"Washington, May 25 (News Bureau)—The Supreme Court overturned the robbery conviction of a Florida man today on the ground that an eight-year delay between his arrest and trial was an 'intolerable violation of his rights.'

The court unanimously ordered the State of Florida to release Robert Dean Dickey, who was sentenced to 10 years in prison after his convicitions in 1968 for an armed robbery in 1960.

Witnesses Unavailable

Chief Justice Warren E. Burger noted that during the eight-year interval two potential witnesses died, a

third became unavailable and police records were lost or destroyed. He declared 'the right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality on the need to have charges promptly exposed.'

Burger noted that Dickey, who repeatedly sought a speedy trial, was in federal prison serving time for bank robbery and was available for trial by the state during the entire period.

Burger wrote. 'Here, however, not valid reason for the delay existed.' "

On page 18 of the petition appears "when it finally came for pre-trial, before Judge Lynch, he refused to pre-try it, and the case was sent back to the assignment Judge who said that he had from the beginning assigned the case to Judge Lynch and Judge Lynch must dispose of this case.

In this petitioner's case during the unauthorized delay of two years by Judge Lynch, six witnesses; namely, the six tenants that were forcibly ejected by 24 hours notice disappeared—there where-abouts became unknown to the petitioner. According to the rules "in lieu of prerogative writs" cases are not pretried, but brought to trial immediately, before all other cases like dispossess cases putting out a tenant for non-payment of rent. Judge Lynch knew that other Judges of the Court, as he stated in his opinion, on the motion of petitioner. For restraint, two years ago and in the alternative for an immediate trial.

Judge Lynch stated in his opinion of two years ago (78a) this same kind of "in lieu of prerogative writs" in regards to this same house, by this petitioner against the same defendant—the Township of North Bergen—wherein that action was brought to trial immediately and without pretrial and decided against the defendant the Township of North Bergen—resulting in the building not being closed up. The following is what Judge Lynch in his opinion of two

years ago on the foregoing motion said, on page (78a) of the testimony.

78a

"As to defendants, they are to determine what course they deem advisable in the performance of their duties, under the instructions of the corporation counsel of the defendant Township, and pursuant to the procedures outlined in the relevant ordinances of the Township. They are likewise to determine whether or not in fact an 'emergency' exists which warrants summary action, as provided in § 104.5 of the National Building Code, if not, they shall follow the procedure outlined in said Code which may be appropriate to a non-emergent situation, and hold such hearing, or take such steps, as they may be advised by the corporation counsel. Parenthetically, it may be added that the Court gathers from the papers that in the year 1963 such a hearing was had. Plaintiffs' Exhibit 1 appears to be an order by the defendant Muss dated March 15, 1963, following such a hearing."

On pages (225a and 226a) of the testimony shows that in another "in lieu of prerogative writ" by this petitioner against this defendant Township of North Bergen, wherein an injunction was granted as the following shows:

225a

"By Mr. Ajamian:

Q. Mr. Ajamian, was your two houses, each a four-family house, at 51st Street, North Bergen, taken down and violated, regardless of the fact there was an injunction signed by Honorable John J. McGeehan—

The Court: Who is that?

Q. (Continued)—to prevent them—

The Witness: I will introduce it into evidence, your Honor.

The Court: Mr. Ajamian hands me what purports to be an order of the Superior Court, dated March 3rd, 1958, signed by Judge John B. McGeehan, which in essence enjoined the defendants, Township of North Bergen, Angelo J. Sarubbi and Eugene Agresta from interfering with the occupancy or renting of the apartments in certain property described in the complaint, and from demolishing the buildings being known as 1608-1610 51st Street, in the Township of North Bergen.

You offer this in evidence?

The Witness: Yes. And also was that house—

The Court: Wait a minute. Do you offer that in evidence?

The Witness: Yes.

The Court: Let it be marked.

Mr. Bazzani: I object to it going in evidence.

The Court: P-12 for identification, so that he may have his record preserved. I'll sustain the objection to its going into evidence: Let it be marked.

Mr. Bazzani: I also object to this question with reference to that, that he has just concluded on the same points.

The Court: One thing at a time, please. Mark it P-12 for identification.

(Injunction signed by Judge John B. McGeehan marked Exhibit P-12 for identification.)

The Court: Have you finished your question, Mr. Ajamian?

The Witness: In addition to that, the house was taken down.

By Mr. Ajamian:

Q. Mr. Ajamian, was the house taken down after a solemn statement given and taken down by the stenographer that the Township of North Bergen will not take the house down until we had a hearing before the Commissioner and came back into court?"

The foregoing delay by Judge Lynch is more fully explained on pages 16, 17 and 18 of the petition which is as follows:

Delay of Justice is denial of Justice. The trial Judge Lynch, by delaying the hearing of this case for two years has denied justice. The object of the motion for restraining Order or in the alternative for an immediate trial was to prevent the property from being vacated as the defendants had proceeded to do by giving the tenants 24 hours to move out and were bringing the police to accomplish their purpose and this failing were proceeding against the tenants in the Criminal Court where the Magistrate was refusing to give the tenants a hearing, as he knew he had no power to order them to vacate, but instead was accomplishing his purpose by saying to the tenants he was going to put them in jail if they did not vacate the premises and move, and adjourning the trial again and again, although this plaintiff was asking for a trial of the issues to the effect that the Magistrate had no right to order the tenants to vacate. Heretofore, the same Magistrate had decided as to this plaintiff that he had no power to order this plaintiff, as the landlord, defendant in the Magistrate Court to dispossess or move the tenants out and vacate this premises in question. None of the tenants had moved out when the motion was heard by the trial Judge Lynch. All the tenants and the Building Inspector were waiting for the decision of Judge Lynch on this motion for a restraining order or an immediate trial.

The plaintiff's trial brief did not state that the plaintiffs were under the impression that an amiable adjustment

had been made. The following on page 2 of the brief is what was stated:

> "that an agreement was made between the building inspector, Milton J. Muss, whereby he promised to allow one tenant to remain, as a caretaker, so as to prevent destruction by intruders. Even this agreement was breached and the building inspector Milton J. Muss broke his promise. When the only remaining tenant moved out, the building inspector, Milton J. Muss, ordered the Public Service Company to shut off the gas and electric, not only for that apartment, but the entire house, the outlets from the street, and the gas and electric meters removed. The building inspector, Milton J. Muss, refused to allow the Public Service Company to install gas and electric service to the new caretaker tenant who had rented the exact same apartment occupied by the former caretaker tenant who had moved out."

The application was not renewed for restraint because as stated by the Court that it was dismissed upon the case of *Rosenberg* v. *Sheen,* 77 N.J.E. 476, 77A 1019 and *Vanderhohen* v. *Rahway,* 120 N.J.L. 610, 1 (A2) 303, appearing at page (297a) of the testimony, which cases plaintiff had cited in his motion for restraint two years ago at which time the Court stated "there is doubt as to plaintiff's motion to such relief", and there being no way of curing this doubt in the Judge's mind as proved by this decision two years later at the trial there was no use in making the same motion over again resulting in antagonizing the Judge. It was thus clear a new motion would be useless, especially in view of the fact Judge Lynch stated in open Court, that he used to be a Magistrate and that this plaintiff could be proceeded against in the Magistrate's Court and fined $200 a day until he complied. The plaintiff at the argument on the motion had urged that if the motion for the restraint was denied, that the Judge should notice

the case for immediate trial or as soon as he possibly could to prevent the building from becoming vacant and consequently resulting in vandalism and breaking of windows by children. At the same time when the complaint in this law action was filed, an exact complaint was filed at the same time in the Chancery Court in case the action did not belong in the law Court. The case in Chancery having come up long ago was dismissed because the Chancery Court stated it belonged in the Law Court which was given equity power in prorogative writs. However, the Chancery, Judge Matthews stated he would speak to Judge Lynch as actions in "lieu of prorogative writ", were to be tried before other actions. But still there was a delay. When it finally came to pre-trial before Judge Lynch, he refused to pre-try it, and the case was sent back to the Assignment Judge who said that he had from the beginning assigned the case to Judge Lynch and Judge Lynch must dispose of this case. Judge Lynch again delayed in pre-trying it until later, when it was pre-tried and a date set for the trial before him.

The plaintiff did not request that the issue of existence or not of a nuisance be tried by the Court, in fact, the plaintiff not being a New Jersey attorney, would never allow an issue of fact to be tried by the Judge because all things being equal there is a tendency to favor a New Jersey lawyer as against a New York lawyer, who is appearing pro se, especially where a municipality is involved.

"In lieu of prorogative writ", the only way, according to the rules, to proceed in this kind of cases there is no jury trial to which plaintiff is entitled to on question of evidence of a nuisance and the only issue was to set aside the proceeding of the Building Inspector and have him proceed according to the Statute of New Jersey and the Building Code of the Township of North Bergen to give notice and have a hearing before the Commissions of the Township, otherwise plaintiff would be deprived of due process of law.

CONCLUSION

It is respectfully requested that the petition for a writ of certiorari be granted.

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